Nos. 12289-12291

In the United States Court of Appeals for the Ninth Circuit

ESTATE OF ELLA K. MCCLATCHY, ELEANOR MCCLATCHY AND CHARLOTTE MALONEY, EXECUTRICES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

CHARLOTTE MALONEY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ELEANOR MCCLATCHY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

These cases were consolidated and submitted for opinion under Rule 30 of the Tax Court's Rules of Prac-

tice. (R. 22.) The taxpayers have not printed in the record the Tax Court's opinion, which is reported at 12 T.C. 370, but for the convenience of this Court we have included it in full as Appendix "B" to this brief.

JURISDICTION

These consolidated petitions for review (R. 35, 42-44) involved federal income and victory tax for the years 1942 and 1943, deficiencies being asserted by the Commissioner as follows: (a) Estate of Ella K. McClatchy, 1942 income tax, $8,639.98, and 1943 income and victory tax, $1,731.25; (b) Charlotte Maloney, 1943 income and victory tax, $213.54; and (c) Eleanor McClatchy, 1943 income and victory tax, $2,904.43,[1] which the Tax Court confirmed under date of May 12, 1949. (R. 32-34.) Notice of the deficiencies were mailed by the Commissioner of Internal Revenue on December 11, 1946 (R. 19); and within ninety days thereafter, March 7, 1947, taxpayers filed petitions with the Tax Court for redetermination under the provisions of Section 272 of the Internal Revenue Code (R. 18). The decisions of the Tax Court were entered May 12, 1949. (R. 32-34.)

The consolidated cases are brought to this Court by taxpayers' petitions for review filed June 14, 1949 (R. 37, 42-43), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. The first issue, raised on behalf of all the taxpayers, is whether the Tax Court erred in refusing to allow deductions in the years 1942 and 1943 for payment of in-

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[1] The deficiencies determined against taxpayers Charlotte Maloney and Eleanor McClatchy involve the year 1942 by virtue of the provisions of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Section 6.

come taxes and interest to the State of California assessed against Charles K. and Ella K. McClatchy, both deceased.

2. The second issue, raised on behalf of the Estate of Ella K. McClatchy, is whether her estate may in 1943 deduct from gross income interest on an inheritance tax deficiency assessed by the State of California in that year in connection with Ella K. McClatchy's demise.

STATUTES AND REGULATIONS INVOLVED

These will be found in Appendix "A", *infra*.

STATEMENT

The facts were stipulated and adopted by the Tax Court accordingly under Rule 30 of its Rules of Practice. (R. 22-31.) See also Appendix B, *infra*. Those found by the Tax Court as relevant to decision herein may be stated thus:

The Commissioner of Internal Revenue determined deficiencies as follows (Appendix B, *infra*):

Petitioner	Docket No.	1942 income tax	Income and victory tax for 1943
Estate of Ella K. McClatchy	13214	$8,639.98	$1,731.25
Charlotte Maloney	13215	.....	213.54
Eleanor McClatchy	13216	.....	2,904.43

The deficiencies determined against taxpayers Charlotte Maloney and Eleanor McClatchy involved the year 1942 by virtue of the provisions of the Current Tax Payment Act of 1943, Section 6. The Ella K. McClatchy estate claims overpayment of the 1943 income and victory tax in the amount of $1,912.12. See Appendix B, *infra*.

Taxpayers Eleanor McClatchy and Charlotte Maloney are the beneficiaries of testamentary trusts Numbers 1 and 2, respectively, of three testamentary trusts created by Charles K. McClatchy, who died April 27, 1936. Each trust received one-third of his estate. These

two taxpayers are also the executrices of the Estate of Ella K. McClatchy, who died September 23, 1939. Accordingly, they represent her estate which is the third taxpayer [petitioner] herein. The returns in question were all filed with the Collector for the First District of California, at San Francisco. (R. 23.) See Appendix B, *infra*.

The Franchise Tax Commissioner of the State of California, acting pursuant to Section 34 of the California Personal Income Tax Act of 1935, assessed additional state income taxes against Charles K. McClatchy and Ella K. McClatchy after their deaths, as follows (Appendix B, *infra*):

Taxable period ended Dec. 31—	Date of Assessment	Additional assessment	
		Charles K. McClatchy	Ella K. McClatchy
1935	Jan. 23, 1939	$1,791.64	$1,797.05
1936	Apr. 1, 1940	2,170.44	5,317.17
Total		3,962.08	7,114.22

Payment of these taxes was protested and they were not paid pending an attack upon the constitutionality of Section 34 of the relevant state statute in the state courts. (R. 24, 26-27; Appendix B, *infra*.)

On March 7, 1941, the Supreme Court of California determined that Section 34 was constitutional. Payment on behalf of the two decedents was made on May 5, 1942 as follows (R. 24-25; Appendix B, *infra*):[2]

Decedent	Deficiency	Interest	Paid by—	Amount
Charles K. McClatchy	$3,932.08	$1,309.33	Trust #1	$1,747.14
			Trust #2	1,747.14
			Trust #3	1,747.14
			Total	5,241.42
Ella K. McClatchy	7,110.22	2,264.59	Estate	9,374.81

No claim for the deduction of the taxes assessed against Charles K. McClatchy and paid by the three testamentary trusts was made in that decedent's final

[2] Concededly the court attack was not made by any of the persons involved here. (R. 7.)

federal income tax return, filed March 15, 1937, or in that decedent's federal estate tax return, filed July 24, 1937, the tax liability with respect to which was finally settled May 14, 1940. Deductions on account of the payment of these taxes plus interest were asserted in 1942 by the parties paying them in that year, but such deductions were disallowed by the Commissioner. (R. 28, 30; Appendix B, *infra.*)

No consents or waivers were filed by either of the individual taxpayers or by the Ella K. McClatchy estate pursuant to Section 134 of the 1942 Act, or Section 126 of the Internal Revenue Code, and the appropriate Treasury Regulations. (R. 28; Appendix "B", *infra.*)

The Commissioner allowed the Estate of Ella K. McClatchy a deduction for 1942 federal income tax purposes of $1,113.92 representing interest on the state income tax deficiency accrued after the death of Ella K. McClatchy. The deduction of the $7,110.22 state income tax and $1,150.67 of the total interest thereon was disallowed. (R. 7, 26; Appendix B, *infra.*)

Section 34 of the California Personal Income Tax Act was repealed in 1937. See Appendix B, *infra.*

In December, 1942, the California Tax Commission assessed additional deficiencies in state income tax against Ella K. McClatchy as follows (Appendix B, *infra*):

Taxable Year	Tax	Interest	Total
1938	$271.42	$63.85	$335.27
1939	543.40	101.03	644.43
Total	814.82	164.88	979.70

These amounts were paid by the estate and claimed as a deduction in 1943. The Commissioner disallowed the deduction of the state income tax in the total amount of $814.82 and $7.22 of the interest which had accrued before the death of Ella K. McClatchy. (R. 26-27; Appendix B, *infra.*)

Ella K. McClatchy's final federal income tax return covering the year 1939 up to the time of her death was filed March 15, 1940. On October 9, 1945, the estate filed a claim for refund of income tax allegedly overpaid in the amount of $5,788.28 for the year 1939. The refund was denied January 6, 1947. Her federal estate tax return was filed December 20, 1940, and a closing agreement was effected June 11, 1942. The deductions in question were not taken in either the final income tax return or in the estate tax return. No waivers or consents were filed pursuant to Section 134 of the Revenue Act of 1942 or Section 126 of the Internal Revenue Code or the applicable Treasury Regulations. (R. 28, 30-31; Appendix B, *infra.*)

In December, 1943, additional California inheritance tax of $5,304.41, plus interest of $2,223.41, was assessed and paid in 1943 in connection with the Estate of Ella K. McClatchy. The beneficiaries of the Charles K. McClatchy trusts were also the beneficiaries of three trusts created by the last will of Ella K. McClatchy. The tax and interest were paid by the McClatchy newspapers and charged against the three testamentary trusts of Charles K. McClatchy. The three trusts claimed a deduction of the interest (though not the principal) in their returns for 1943, which claim was disallowed by the Commissioner. (R. 27, 30; Appendix B, *infra.*)

On June 1, 1944, the Ella K. McClatchy estate asserted that the payments were improperly made by the trusts, and accordingly the McClatchy newspapers corrected these charges on their books and showed them made against the taxpayer estate. The estate claims the interest on this inheritance tax assessment as a deduction from income for 1943; neither the Commissioner nor the Tax Court allowed any deduction in respect of this interest. (R. 27-28; Appendix B, *infra.*)

The returns in question were all filed on the cash

receipts and disbursements basis. (R. 27; Appendix B, *infra.*)

The Tax Court confirmed the Commissioner's determinations in all respects. (R. 32-34.)

SUMMARY OF ARGUMENT

1. The deduction claims here in question concern additional income taxes and interest thereon levied by the State of California in respect of Ella K. McClatchy and Charles K. McClatchy, both deceased; the assessments against Mrs. McClatchy covering the years 1935, 1936, 1938, and 1939, and those against Mr. McClatchy covering 1935 and 1936. The state law under which the 1935 and 1936 levies against these decedents were made was repealed in 1937; and, while the law was in effect, its constitutionality was challenged in the state courts by persons other than the McClatchys, resulting in a decision by the Supreme Court of California in 1941 that the statute was valid. Meantime, the levies against the two decedents for 1935 and 1936 were protested, and payment was held in abeyance awaiting the outcome of the state litigation. The state levies in respect of Mrs. McClatchy covering the years 1938 and 1939 were not even protested—they simply were not paid. No claim was made with respect of any of these taxes in either of the decedents' final federal income tax return or their respective federal estate tax returns, these being all filed prior to rendition of the decision upholding the pertinent state law.

Since payment of the state taxes in respect of Charles K. McClatchy was made by the distributees under his will who are here asserting claim to deduction therefor in the year of payment, and since it is similarly the Estate of Ella K. McClatchy who is the payor and the deduction claimant in respect to the state assessments against her, one is immediately confronted with the well-established principle of federal tax law that

the deductions granted by Congress against gross income for taxes and other deductible liabilities apply only in favor of the person against whom the particular liability is imposed. Allowance of deduction to anyone except the actual obligor is not permissible; and here not one of the payor claimants is the person against whom the state assessments were made. Accordingly, if there be no exception to the general rule which has application to this case, deduction must be *in toto* denied. We maintain that there is no applicable exception here; deduction in respect of these items should, under the law and in the circumstances, have been asserted in the respective decedents' final federal income tax returns; or possibly in the alternative, as we shall later elucidate, claim for adjustment therefor should have been made against the taxes in respect of the decedents' estates.

There is no merit to counsel's contention that the general rule above stated does not prevent the present assertion of these claims by the payors because until the validity of the California law was established in 1941 the items could not be said to have accrued for deduction purposes. The argument is based upon United States Supreme Court authority holding that a living taxpayer may not deduct a state tax, liability for which it is itself strenously litigating in the year for which deduction is claimed. We maintain that, for reasons hereinafter elaborated, the principle upon which counsel relies cannot be expanded to cover this case; Supreme Court authority is also firmly to the effect that the internal revenue laws place a taxpayer who, as here, used the cash system of reporting during his life-time, upon the accrual basis for the last taxable period of his life. True, in 1942, Congress passed certain remedial legislation looking toward the alleviation of possible hardship engendered by the application of that rule; but such legislation had retroactive effect

only under carefully prescribed conditions set forth in the statute and in the Treasury Regulations which were authorized to be promulgated and which *were* promulgated thereunder, discussion of which later appears. And it is admitted that none of the claimants made any attempt whatever to comply with these conditions. They thus lost any chance they might have had to claim any rights they might have had themselves to claim deduction as payors in respect of these items when they paid them. And it will do claimants no greater good to assert that they need not have complied with the statutory conditions attendant upon the retroactive feature contained in the remedial legislation of 1942, than it did initially to assert that irrespective of that legislation these items could not have been deducted in the decedents' final federal income tax return because not "accrued" until the California Supreme Court handed down its decision. Counsel's reasoning in this regard is precisely the same; our answer is also the same; with the additional factor that Congress certainly had every right to name the conditions under which it granted its legislative grace; no matter what the circumstances or the possible hardship entailed, the claimants were required to hew to the line. And what we have said with respect to the principal of these state taxes applies with equal or greater force, as will be seen in our main discussion, to the interest assessments thereon except only that part of the interest which accrued in respect of Mrs. McClatchy after her death. And that the Commissioner did allow to her estate.

2. Nor is there virtue to the claim of Mrs. McClatchy's estate that it should be allowed deduction from current estate income because of payment it made for interest upon a deficiency assessment for state inheritance taxes in respect of her death. Once again, the inheritance tax was not an obligation of the

payor. The basic scheme of the California inheritance tax law is to place primary liability therefor on the distributees; the obligation of the estate is merely an administrative one. The interest logically follows the tax, and the same principle of law should accordingly govern.

ARGUMENT

I

The Tax Court Correctly Confirmed the Commissioner's Determination That under the Law and in the Circumstances the Pertinent California Income Taxes Assessed by That State in Respect of Charles K. McClatchy and Ella K. McClatchy, Both Deceased, Plus a Portion of the Interest Paid Thereon, Were Not Proper Deductions from Income for Federal Tax Purposes by Any of the Taxpayers Herein

Preliminary.

Since this issue is somewhat complex on its facts, we propose as precedent to our principal legal discussion briefly to review certain salient matters. During the federal tax years here under consideration, the taxpayer, Estate of Ella K. McClatchy, was in course of administration, she having died on September 23, 1939. Prior to her death, Ella K. McClatchy was the widow of Charles K. McClatchy, he having died on April 27, 1936. See Appendix B, *infra*.

In January of 1939, which was before her death, the Franchise Tax Commissioner of the State of California levied additional state income taxes against Ella K. McClatchy for 1935, based upon the provisions of Section 34 of the California Personal Income Tax Act of 1935 (California Statutes (1935), c. 329, pp. 1122-1123), which section provided as follows:

> Section 34. For the purpose of this act a personal holding company * * * shall not be recognized as a legal entity separate and distinct from the shareholders thereof. Any such company having more than one shareholder shall be deemed a partnership.

And, in April of 1940, which was after Mrs. McClatchy's death, the State Commissioner levied additional state income taxes against her under the same provision of the California law covering the year 1936. Similarly, an additional assessment was made and on the same dates in respect of Charles K. McClatchy for the years 1935 and 1936, he being deceased at the date of these levies. (R. 24; Appendix B, *infra.*)

The above quoted provision of the California income tax law was in effect only for the years 1935 and 1936, the section being repealed in 1937. *McCreery* v. *McColgan,* 17 Cal. 2d 555, 110 P. 2d 1051. Its constitutionality was contested in the state courts by several taxpayers, resulting in a judgment entered March 7, 1941, upholding the section's validity. *McCreery* v. *McColgan, supra.* Neither of the decedents against whom the assessments were made nor any of the taxpayers now at bar were participants in any of this litigation; it appears only that the particular assessments here in question made in respect of Ella K. McClatchy and her deceased husband were protested and that they were held in abeyance pending the outcome of the litigation in respect of the constitutionality of the section. See Appendix B, *infra; McCreery* v. *McColgan, supra.* In other words, it would seem that no action was taken by either the state taxing authorities or by the decedents or those representing them in respect of the matter of the liability of these decedents until after the *McCreery* decision had been handed down in 1941. Things were merely allowed to rest by all parties concerned.[3]

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[3] The 1935 additional state assessment in respect of both Charles and Ella K. McClatchy was dated January 23, 1939, and the assessments for 1936 were dated April 1, 1940. The Tax Court found that the assessments for these taxes were actually made after the death of both decedents. See Appendix B, *infra.* Cf. R. 24 and fn. 13, *infra.*

After Section 34 of the pertinent state statute was upheld, the Ella K. McClatchy estate paid the assessment against her on May 5, 1942, and deduction therefor, together with interest, was taken by the estate in its federal income tax returns for that year. Likewise, on May 5, 1942, the three testamentary trusts set up by the decedent husband paid the state income tax assessments made in respect to him and took deductions in their 1942 federal income tax returns for payment of principal and interest in *re* this state tax. In the case of both decedents, no claim whatever was made in either their final federal income tax returns or in their federal estate tax returns with respect to these items. See Appendix B, *infra*.[4]

The Commissioner refused to allow the testamentary trust payors any deduction at all in regard to the state taxes assessed in *re* Charles K. McClatchy.[5] He also denied the Ella K. McClatchy estate deduction of anything in respect to the assessments against her for the years 1935 and 1936, except the interest on the asserted state income tax deficiencies for that period which had accrued *after* her death. The interest so accrued

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[4] The final federal income tax return of Charles K. McClatchy was filed March 15, 1937; his federal estate tax return was filed July 24, 1937, and finally settled May 14, 1940. The final federal income tax return of Ella K. McClatchy, covering the year 1939 up to the time of her death in September of that year, was filed March 15, 1940; her federal estate tax return was filed December 20, 1940, and a closing agreement was effected June 11, 1942. See Appendix B, *infra*.

[5] Accordingly, the Commissioner increased the income distributable to taxpayers Eleanor McClatchy and Charlotte Maloney, the respective beneficiaries of testamentary trusts No. 1 and No. 2 created by Charles K. McClatchy in the amount of $1,747.14 each for the year 1942. The Charles K. McClatchy Trust No. 3 also paid a proportionate share of the state income tax deficiency in respect of its settlor, but seemingly the effect of that payment was not sufficiently consequential to the trust or to the beneficiaries thereof to warrant trust No. 3 in seriously asserting or litigating the right to federal income tax deduction therefor. See Appendix B, *infra*.

amounted to $1,113.92, and that sum the Commissioner *did* allow to the Ella K. McClatchy estate as a deduction in 1942, the year of payment by the estate. See Appendix B, *infra*.

In December of 1942, the California Tax Commission assessed additional deficiencies in state income tax in respect of decedent Ella K. McClatchy for the years 1938 and 1939, together with interest, totalling $979.70. Although the record does not elucidate, it is evident that these assessments were made under some section of the California Personal Income Tax Act other than Section 34, which section as we have heretofore noted was repealed in 1937.[6] At all events, so far as this record shows, no protest was made in regard to these assessments, and they were with interest paid by the Ella K. McClatchy estate and claimed as a deduction in 1943. Once more the Commissioner disallowed any deduction therefor to the estate save the amount of interest which had accrued *after* Ella K. McClatchy's demise. See Appendix B, *infra*.

A. *No part of the principal of the state income taxes assessed in respect of either decedent was deductible by any of the taxpayers herein*

The Tax Court, in its opinion (Appendix B, *infra*) said this:

> Both parties are in apparent agreement that the deductions claimed for the year 1942 on account of the payments of state income taxes assessed against the decedents, Charles K. and Ella K. McClatchy * * * must be supported by the provisions of sections 23 (w) and 126, added to the Internal Revenue Code by section 134 of the Revenue Act of 1942 [footnote omitted], since

[6] For a sketch of the scope of the California taxing act, see again *McCreery* v. *McColgan, supra*. See also c. 329 of the 1935 California Act.

> * * * [such] taxes * * * were assessed against the decedents and not against the entities which made the payments on account thereof. * * *

The "agreement" referred to in the above excerpt would appear to be real as well as apparent, for the taxpayers' argument on brief to this Court is actually merely one of confession and avoidance; they have no affirmative plea. It is clearly the general rule that the deduction granted by Congress against gross income for taxes and other deductible liabilities applies only in respect to the person against whom the obligations are imposed; "volunteers", whatever their pecuniary interest in seeing the obligation discharged and whether such interest be present or future, have no right to deduction—allowance of deduction to anyone except the actual obligor is not permissible. *Helvering* v. *Enright,* 312 U. S. 636; *Clough* v. *Commissioner,* 45 B.T.A. 97; *Burton* v. *Commissioner,* 37 B.T.A. 636; *Estate of Hoffman* v. *Commissioner,* 36 B.T.A. 972; *Perry* v. *Commissioner,* 32 B.T.A. 513; *Small* v. *Commissioner,* 27 B.T.A. 1219. In the case now at bar, the state income taxes in question were unquestionably imposed upon the two decedents; payment was made, and deduction is sought by totally different entities.[7] Therefore if the general rule has no exception applicable to this case, the deductions must manifestly be denied these claimants. Cases cited, *supra.*[8]

So saying, let us first endeavor to dispose of the Ella K. McClatchy estate claim that it is entitled to deduction in 1942 for payments then made in respect to the

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[7] We are not speaking now of the *interest* on these state taxes. In some respects that is a different problem, and will be considered hereinafter.

[8] We think it is not necessary to remind this Court that taxpayers are here claiming deductions which are matters of legislative grace, and only as there is clear provision therefor can any particular deduction be allowed. *New Colonial Co.* v. *Helvering,* 292 U. S. 435.

additional state income taxes levied against that decedent for the years 1935 and 1936 under Section 34 of the California taxing statute. Section 43 of the Internal Revenue Code (Appendix A, *infra*), in effect as of the date of Ella K. McClatchy's death in September, 1939, reads as follows:

> The deductions and credits * * * provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, * * *. In the case of the death of a taxpayer there shall be allowed as deductions and credits for the taxable period in which falls the date of his death, amounts accrued up to the date of his death * * * if not otherwise properly allowable in respect of such period or a prior period.

Mrs. McClatchy, the decedent of whom we now speak, filed her returns on the cash basis (Appendix B, *infra*); and since the state taxes in question were not paid during her lifetime, it is elementary, of course, that no deduction could have been taken therefor prior to her demise regardless of whether the state imposts had "accrued" within the meaning of such cases as *United States* v. *Anderson,* 269 U.S. 422. The Commission's position therefore is first that deductions in respect of these items were properly to be taken in Mrs. McClatchy's last federal income tax return in accordance with the sentence in Code Section 43, above quoted, that—

> In the case of the death of a taxpayer there shall be allowed as deductions and credits for the taxable period in which falls the date of his death, amounts accrued up to the date of his death * * *

it having been held by the Supreme Court that the purpose of Code Section 43 (as well as Code Section

42 dealing with the reporting of income as distinguished from the taking of credits or deductions) is to place the last return of a decedent on the accrual basis of accounting even though a cash basis has been used for previous years. *Helvering* v. *Enright,* 312 U. S. 636, 644. In accordance with this interpretation, allowance is properly made for items such as those now under examination in the decedent's last return, regardless of payment.

However, it is the tenor of counsel's argument (Br. 9 *et seq.*) that no deduction could have been taken in respect of these state taxes in Mrs. McClatchy's final federal income tax return because they were *not* then "accrued"; that they did not "accrue" until March of 1941 when the Supreme Court of California handed down the *McCreery* decision upholding the validity of Section 34 of the basic state statute. Principal reliance for this position is on the Supreme Court's decision in *Dixie Pine Co.* v. *Commissioner,* 320 U. S. 516. It will be recalled that in the *Dixie Pine* case, the taxpayer who reported on the accrual basis, accrued and deducted in 1937 a state gasoline tax, although at the time it was vigorously urging in the state courts that the tax was not applicable to it. The litigation was finally decided in Dixie Pine Company's favor in 1938, and the company then reported the amount of the deduction as income of the year of decision. The Supreme Court, in holding that the taxes claimed as accrued and deducted in 1937 were not a proper deduction of that period, stated in part as follows (p. 519):

> It has never been questioned that a taxpayer who accounts on the accrual basis may, and should, deduct from gross income a liability which really accrues in the taxable year. It has long been held that in order truly to reflect the income of a given year, all the events must occur in that year which

> fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid; and this cannot be the case where the liability is contingent and is contested by the taxpayer. Here the taxpayer was strenuously contesting liability in the courts and, at the same time, deducting the amount of the tax, on the theory that the state's exaction constituted a fixed and certain liability. This it could not do. *It must, in the circumstances, await the event of the state court litigation and might claim a deduction only for the taxable year in which its liability for the tax was finally adjudicated.* (Italics supplied.)

Now counsel's proposition seems to be that the doctrine of *Dixie Pine* covers not only a case where the taxpayer in question is affirmatively and of itself challenging liability for the item sought as a deduction, but that it extends as well to a situation where as here (see Appendix B, *infra*), the taxpayer merely registers some kind of protest to a proposed assessment and then sits back and waits without payment or without being required to pay while the state taxing authorities and some other person or persons litigate to final determination the matter of constitutionality rather than the applicability of the statute on which liability against the taxpayer is asserted.

We do not believe that the *Dixie Pine* case carries that coverage. In the excerpt from the Supreme Court's opinion appearing, *supra,* it will be noted that Justice Roberts, speaking for the Court, emphasized that the taxpayer was itself strenuously contesting liability in the courts during the period of claimed deduction; recall too that Justice Roberts declared deduction to be permissible only in the year that the litigating taxpayer—not some *other* taxpayer or taxpayers—was finally adjudicated liable. In other words, it does not seem to us that the doctrine of the *Dixie*

Pine case permits one taxpayer to "adopt" the lawsuit of another in order to delay the accrual of an item "matured" as to *it* under the criteria established by *United States* v. *Anderson, supra,* and kindred cases. Much the same idea as here entertained by counsel, albeit in a different framing, has been rejected by the Court of Appeals for the Third Circuit. *Freihofer Baking Co.* v. *Commissioner,* 151 F. 2d 383.

Nor do we think the mere fact that a "protest" was made to the proposed assessment suffices to delay accrual in the circumstances of this case until 1941—the date of the California Supreme Court's *McCreery* decision—although the fact of its making does serve, we believe, to show that the proposed assessment against Mrs. McClatchy was anything but a whimsey or unfounded in law until 1941. (Cf. Br. 12-13.) Perhaps we can put the matter to test in this manner: If the the *McCreery* litigation, had made demand on Mrs. State of California, instead of awaiting the outcome of McClatchy for the taxes it considered due from her, could she have placidly ignored it, relying on the pendency of the *McCreery* case? We do not think so—and we are speaking now, of course, of Mrs. McClatchy's ignoring such a demand rather than affirmatively rejecting or resisting it. Our view, in fine, is that quiescence and lethargy by the creditor and a similar state of inactivity on the part of the debtor are not attitudes which will prevent timely and proper accrual of a liability within the scope of Justice Roberts' very non-lethargic words in *Dixie Pine.*[9]

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[9] We recognize that the case of *Great Island Holding Corp.* v. *Commissioner,* 5 T. C. 150, might be considered Tax Court authority contrary to this position although we believe that case and this one factually distinguishable. To the extent, however, that the cases cannot be thus distinguished, we would maintain that the Tax Court's views as expressed in *Great Island Holding* are too broad.

And finally, apropos of this matter of the alleged immaturity of the liability and the alleged difficulty of taking the deduction on the decedent's final return by reason thereof, we call attention to Section 953 of the Probate Code of California which states as follows:

> Section 953. Contingent, etc., claims. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require.

Had this statute been followed by a careful executor, the amount of the state taxes asserted for 1935 and 1936 as well as those for 1938 and 1939 would have been paid into court when Mrs. McClatchy died; and we suggest that there is every probability that in those circumstances the Commissioner of Internal Revenue would have permitted deduction therefor to be taken on the decedent's last return.

Of course, irrespective of whether the items concerned here could or should have been taken as deductions on Mrs. McClatchy's final return, the fact is that they *were* not; and we are left accordingly with our initial proposition under this heading that since the deduction claim in question is now being asserted by the estate which is not the person or entity assessed by the state taxing authorities then as the Tax Court stated (Appendix B, *infra*) the claimant must, to succeed, show that deduction is permissible under some established exception in the law; and it seems to us clear that the only possible exception lies in the additions to the Code made by Section 134 of the Revenue Act of 1942, c. 619, 56 Stat. 798,

the pertinent provisions of which are for the convenience of the Court set forth in the margin at this point in our discussion.[10] As we have heretofore stated, prior to 1942 income and deduction items accrued to the date

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[10] SEC. 134. INCOME IN RESPECT OF DECEDENTS.

(a) *General Rule.*—The last sentence of section 42 (a) (relating to inclusion in gross income of amounts accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of the taxpayer's death."

(b) *Deductions and Credits.*—The last sentence of section 43 (relating to deductions and credits accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death."

(c) *Cross Reference.*—Section 22 (relating to definition of gross income) is amended by inserting at the end thereof the following:

"(1) *Income of Decedents.*—For inclusion in gross income of certain amounts which constituted gross income in respect of a decedent, see section 126."

(d) Deductions of Estate.—Section 23 (relating to deductions) is amended by inserting at the end thereof the following:

"(w) *Deductions of Estate, Etc., on Account of Decedent's Deductions.*—

"(1) In the case of a person described in section 126 (b), the amount of the deductions in respect of a decedent to the extent allowed by such subsection.

"(2) In the case of a person described in section 126 (a), the amount of the deductions in respect of a decedent to the extent allowed by section 126 (c)."

(e) The Internal Revenue Code is amended by inserting after section 125 the following new section:

"SEC. 126. INCOME IN RESPECT OF DECEDENTS.

* * * * *

"(b) *Allowance of Deductions and Credit.*—The amount of any deduction specified in section 23 (a), (b), (c), or (m) (relating to deductions for expenses, interest, taxes, and depletion) or credit specified in section 31 (foreign tax credits), in respect of a decedent which is not properly allowable to the decedent in respect of a

of a taxpayer's death were required to be included in the return for his last taxable year. *Helvering* v. *Enright, supra; Pfaff* v. *Commissioner,* 312 U. S. 646; *Estate of Putnam* v. *Commissioner,* 324 U. S. 393. In order to alleviate certain obvious hardships resultant on that rule, Congress amended the Code—the net effect of Section 134 of the Revenue Act of 1942, the amendment, being in general that deceased cash basis taxpayers were no longer placed upon the accrual basis for the last taxable period of their lives. *Larkin's Estate* v. *Commissioner,* 167 F. 2d 115 (C. A. 2d). See also H. Rep. No. 2333, 77th Cong., 2d Sess. p. 84 (1942-2 Cum. Bull. 372, 436); S. Rep. No. 1631, 77th Cong., 2d

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taxable period in which falls the date of his death, or a prior period, shall be allowed:

"(1) *Expenses, interest, and taxes.*—In the case of a deduction specified in section 23 (a), (b), or (c) and a credit specified in section 31, in the taxable year when paid,—

"(A) to the estate of the decedent; except that

"(B) if the estate of the decedent is not liable to discharge the obligation to which the deduction or credit relates, to the person who, by reason of the death of the decedent or by bequest, devise, or inheritance acquires, subject to such obligation, from the decedent an interest in property of the decedent.

* * * * *

(f) *Effective Date of Amendments.*—The amendments made by subsections (a) and (b) of this section shall be applicable with respect to taxable years beginning after December 31, 1942, and the amendments made by subsections (c), (d), and (e) of this section shall be applicable with respect to taxable years ending after December 31, 1942.

(g) *Taxable Years Before 1943.*—In case the taxable period in which falls the date of the death of the decedent began after December 31, 1933, and before January 1, 1943, the tax for such taxable period shall be computed as if provisions corresponding to the provisions of sections 42 (a) and 43 of the Internal Revenue Code, as amended by subsections (a) and (b) of this section, were a part of the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1938, or the Internal Revenue Code, which ever is applicable to such taxable period. In the case of the estate of such a decedent and of each person who acquires by reason of the death of such decedent or by bequest, devise, or inheritance from such decedent the right to receive the amount of items of gross

Sess., pp. 100-105 (1942-2 Cum. Bull. 504, 579-583).[11] As seen from footnote 10 foregoing, Section 134 added to the Code Section 126, subsection (b) of which relates to deductions and credits, including taxes, in respect of a decedent that are not allowable for the taxable period in which fall the date of death or a prior period. Such deductions and credits are under the new law allowable to the estate or, if the estate of the decedent is not liable to discharge the obligation to which the deduction or credit relates, then allowance is made to the person who, by reason of the death of the decedent or by bequest, devise, or inheritance acquires, subject to such obligation, from the decedent an interest in property of the decedent.

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income of the decedent which upon the application of the preceding sentence are not properly includible in respect of the taxable period in which falls the date of the decedent's death or a prior period, the tax for each taxable period ending on or after the date on which the decedent died shall be computed by including in gross income the amounts with respect to such decedent which would be includible, and by allowing as deductions and credits the amounts with respect to such decedent which would be allowable, if provisions corresponding to the provisions of the section inserted in the Internal Revenue Code by subsection (e) of this section were a part of the law applicable to such taxable period. The provisions of this subsection shall not be applicable unless there are filed with the Commissioner (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, and at the time prescribed by such regulations) signed consents made under oath by the fiduciary representing the estate and by each such person (or if any such person is no longer in existence or is under disability, by his legal representative) that with respect to such amounts, the tax of the estate, or the tax of such person, as the case may be, shall be computed under the provisions of this subsection for each taxable period ending on or after the date of the death of the decedent and the tax of the decedent shall be computed under such provisions for the taxable period of the decedent in which falls the date of his death. * * *

(26 U.S.C. 1946 ed., Secs. 22, 23, 42, 43, 126.)

[11] In fact, even accrual basis taxpayers by virtue of a new sentence added to Section 42 (a) were not required to include amounts "accrued only by reason of the death of the taxpayer". See Revenue Act of 1942, Section 134 (a).

The parts of Section 134 vital to disposition of this case are subsections (f) and (g). Subsection (f) states that the provisions of the statute relating to amounts of income, credit, and deduction items accrued up to death of the taxpayer shall be applicable with respect to tax years beginning after December 31, 1942. Obviously, that effective date would not encompass this case. However, under subsection (g), Congress permitted retroactivity as follows:

> (g) *Taxable Years Before 1943.* In case the taxable period in which falls the date of the death of the decedent began after December 31, 1939, and before January 1, 1943, the tax for such taxable period shall be computed as if provisions corresponding to the provisions of section 42 (a) and 43 of the Internal Revenue Code, as amended by subsections (a) and (b) of this section, were a part of the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1938, or the Internal Revenue, which ever is applicable to such taxable period. In the case of the estate of such a decedent and of each person who acquires by reason of the death of such decedent or by bequest, devise, or inheritance from such decedent the right to receive the amount of items of gross income of the decedent which upon the application of the preceding sentence are not properly includible in respect of the taxable period in which falls the date of decedent's death or a prior period, the tax for each taxable period ending on or after the date on which the decedent died shall be computed by including in gross income the amounts with respect to such decedent which would be includible, and by allowing as deductions and credits the amounts with respect to such decedent which would be allowable, if provisions corresponding to the provisions of the section inserted in the Internal Revenue Code by subsection (e) of this section were a part of the law applicable to such taxable period.

But most importantly here, subsection (g) of Section 134, next continues:

> *The provisions of this subsection shall not be applicable unless there are filed with the Commissioner (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, and at the time prescribed by such regulations) signed consent made under oath by the fiduciary representing the estate and by each such person * * * that with respect to such amounts the tax of the estate, or the tax of such person, as the case may be, shall be computed under the provisions of this subsection for each taxable period ending on or after the date of the death of the decedent and the tax of the decedent shall be computed under such provisions for the taxable period of the decedent in which falls the date of his death.* (Italics supplied.)

In short, Congress has strictly and explicitly conditioned retroactive applicability of these amendments, as to the period before 1943, by requiring the filing of signed consents in the precise manner and of the exact content by the persons specified, all as set forth in the statute and the concomitant Regulations which the statute authorizes the Commissioner to prescribe. If the conditions required by Section 134 (g) and the Regulations which the Commissioner has promulgated thereunder with respect to these consents are not met, then the rule of the *Enright* case yet obtains as to tax periods prior to 1943; absent fulfillment of the conditions as to the very letter, the new amendments carry no retroactivity. *Larkin's Estate* v. *Commissioner,* 167 F. 2d 115 (C. A. 2d), *supra; Estate of Ingraham* v. *Commissioner,* 8 T. C. 701.

It is admitted here that no consents of any kind or description were filed in accordance with either statute

or Regulations.[12] (R. 28.) But counsel counters this by asserting (Br. 12-13) that in the circumstances consent was not required since the final federal income tax of Ella K. McClatchy was filed on March 15, 1940, about a year prior to the determination that the state tax was constitutional; by reason of the alleged delayed accrual of these state taxes, it is asserted (Br. 12), there was nothing to waive until the taxes did accrue—in short, the *Dixie Pine* doctrine again. Earlier in this brief we have set forth at some length our reasons for believing that the principle enunciated by the Supreme Court in the *Dixie Pine* case cannot be applied to the facts of this one so as to defer proper accrual of the state tax in question until the California Supreme Court had set at rest the validity of the pertinent statute; we have also put forward the suggestion that deduction would probably have been allowed in the decedent's final federal income tax return had the amount of the proposed deficiency been paid into court pursuant to the provision of the California Probate Code hereinbefore set forth, on the assumption here made in this connection *arguendo* that until the outcome of the *McCreery* litigation, Mrs. McClatchy's liability *was* a contingent one. Our argument in respect of those matters is equally germane, we think, in response to this of counsel's contention that there was really nothing to waive or to which to consent under Section 134 (g) of the Revenue Act of 1942 until the *McCreery* case was decided. We see nothing to add to our argument at this juncture apropos of these points.[13]

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[12] The appropriate Treasury Regulations are Section 29.126-4 of Regulations 111. See Appendix A, *infra*.

[13] Except that perhaps we should call the Court's attention to an apparent discrepancy between the stipulation of facts and the findings of the court below. The Tax Court found (Appendix B, *infra*) that the additional state income tax assessments for both 1935 and 1936 and in respect of both decedents were made after

And, in any event, whether or not we are correct in asserting that the *Dixie Pine* case will not support counsel's theses, we think unanswerable the Commissioner's position, and the Tax Court's concurrence therein (Appendix B, *infra*), that the clear and unambiguous language of Section 134 (g) of the Revenue Act of 1942 does demand that consents be filed precisely as the statute and the Regulations declare. The law is precise and plain of terminology; there is no warrant whatever for enlarging its meaning by construction, or for making exceptions to its terms irrespective of possible hardship. Section 134, though a relief measure, is clearly a grant of grace. Cf. *Deputy* v. *duPont,* 308 U. S. 488; *Taft* v. *Commissioner,* 304 U. S. 351; *Estate of Ingraham* v. *Commissioner, supra; Journal Publishing Co.* v. *Commissioner,* 3 T. C. 518.

We have already referred to the case of *Larkin's Estate* v. *Commissioner,* 167 F. 2d 115 (C. A. 2d). The Court of Appeals there held that a consent to comply with the terms of Section 134 (g), which authorizes the estates of persons dying before the effective date of that Act, by filing a consent to have income "accrued" at the time of death only by reason of death (*Helvering* v. *Enright, supra*), taxed when received as provided by the 1942 Act, which consent was filed only by the executor but not by the trustees of the residuary estate nor by the residuary legatees does not meet the statutory requirements. It was there argued by the taxpayer estate that the executors who signed the consent had since paid the tax upon all the accruals existing at the time of decedent's death as they realized the cash pay-

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their deaths; the stipulation of facts (R. 24) recites that the additional assessment for the year 1935 against Ella K. McClatchy was made during her lifetime.

Also, the record fails to show whether the protests against these assessments were timely filed and whether content of the protests met the requirements of the state statute. See California Statutes (1935), c. 329, Sec. 19, pp. 1112-1113.

ments represented by these accrued items, and since the legatees and trustees did not themselves directly receive the taxable income, consents by them to pay taxes were unnecessary and could not be regarded as required within the purpose of the statute. The Court of Appeals answered that consents *were* plainly required from the trustees and legatees by the Regulations, and by Section 134(g) in terms; the court's opinion referred to the evident intention of Congress to grant retroactive relief against the *Enright* rule as to all open years only under proper safeguards insuring payment of the tax by the recipients of income in such years;[14] and in conclusion the Second Circuit said in *Larkin* (p. 116):

> In any event, diminution of taxes or partial exemption from taxes realized through application of this Act was a privilege afforded by Congress and a taxpayer must bring himself within the strict terms required for the election in order to secure its benefits.

We have likewise already made mention of the Tax Court's decision in *Estate of Ingraham* v. *Commissioner,* 8 T. C. 701. There it was held that an informal letter of consent sent by the estate executor to the Collector instead of to the Commissioner which did not comply in form or content with the Regulations promulgated under Section 134 (g), and the complete failure of the residuary legatees under the will timely to file any kind

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[14] See, apropos of this, the remarks of Mr. Randolph Paul in 1942, then tax advisor to the Secretary of the Treasury, in hearings held by the Committee on Ways and Means with respect to revenue law revision. 1 House Hearings Before the Committee on Ways and Means, Revenue Revision of 1942, p. 89. See also the Report of the Ways and Means Committee recommending the amendments which became Section 134 of the Revenue Act of 1934. H. Rep. No. 2333, 77th Cong., 2d Sess. p. 84 (1942-2 Cum. Bull. 372, 436). See also S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 100-105 (1942-2 Cum. Bull. 504).

of consent, made mandatory inclusion in decedent's last return of income accrued to the date of his death. In the *Ingraham* case, it was contended *inter alia* that the residuary legatees were not obliged to file consents because as charitable, educational, or religious organizations, they were exempt under Code Section 101 (26 U.S.C. 1946, ed., Sec. 101). Answering this argument, the Tax Court said (p. 705):

> Both the petitioner, as executor, and the beneficiaries must comply with the law; this they have not done. We do not think there is any merit in petitioner's contention that, since the residuary legatees were tax exempt, they were therefore not required to comply with section 134 (g). Neither the law nor the regulations exempt tax-exempt corporations from compliance.

One need but look at the Regulations promulgated under authority of Section 134 (g) to see how carefully is conditioned the relief afforded by the retroactive feature of the new law. For instance, in addition to the specific requirements made by Section 134 (g) itself, Section 29.126-4 of Treasury Regulations 111, *inter alia,* provides that all consents with respect to any one decedent shall be filed at the same time with the Commissioner of Internal Revenue at Washington, D. C. The Regulations provide further that the consents must be filed not later than one year after the time prescribed for filing the return for the last taxable year of the decedent (not including any extension of time for such filing) or January 1, 1944, whichever is later. Additionally, the Regulations require that accompanying the consents there must be submitted under oath statements containing certain elaborately specified information.

If such stringency seems perhaps unduly harsh in the peculiar circumstances of a given case, then we

answer that federal tax law is replete with such. A familiar leading case is, for instance, *Riley Co.* v. *Commissioner,* 311 U. S. 55, in which the Supreme Court held that in the computation of net income in the case of mines, Section 114 (b)(4) of the Revenue Act of 1934, which permitted deductions for depletion on a percentage basis, provided that the taxpayer in making his "first return" under the Act should there elect to avail himself of that basis, was not satisfied by the filing of an amended return after the expiration of the statutory period for filing the originals.[15] Another example to the same effect is the decision in *Scaife* v. *Commissioner,* 314 U. S. 459, a capital stock declaration of value case, where the election was the result of a mistake. Still another well known authority is *Mother Lode Co.* v. *Commissioner,* 317 U.S. 222, 227, where, as in the *Scaife* case, the Supreme Court said that the congressional grant relied upon by the taxpayer was "a liberal offer limited to those who meet the exact statutory terms." This Court, in *Degnan* v. *Commissioner,* 136 F. 2d 891, certiorari denied, 320 U.S. 778, recognized the principle we are now propounding when it refused to recognize a delinquent return making an election for percentage depletion as a "first return" within the meaning of Section 114 (b)(4) of the Revenue Act of 1938, c. 289, 52 Stat. 447, even though such delinquent return was in fact the first one which the taxpayer Degnan had made.

And, even if we are not correct in the foregoing part of our argument, still no weight can be given to the

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[15] In response to the taxpayer's plea in *Riley* v. *Commissioner, supra,* that it had no actual knowledge of the opportunity to elect percentage basis depletion and that equitable considerations should therefore govern, the Supreme Court said (p. 59):

> That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided.

claim of the Ella K. McClatchy Estate that it is entitled to deduct the principal of the state tax deficiency assessed in respect to decedent Ella H. McClatchy for 1938 and 1939, paid by the estate in 1943. (Appendix B, *infra.*) The record does not contain one word of protest in respect of this; much less again is there evidence that any consents or waivers were filed anent Section 134 (g) of the Revenue Act of 1942. All that the taxpayer estate or anyone can say is that it voluntarily paid the assessment in May and June of 1943, once more a volunteer. *Ergo, Dixie Pine* can have no application whatever—even if we assume that it has application anywhere in this case. See *Commissioner* v. *United States Trust Co.,* 143 F. 2d 243 (C.A. 2d), certiorari denied, 323 U.S. 727.

The husband of Ella K. McClatchy, Charles K. McClatchy, died earlier than she did, his death having occurred in April of 1936. (Appendix B, *infra.*) Thus, although the additional state tax asserted against him covered the years 1935 and 1936, the date of the assessments therefor succeeded his death (Appendix B, *infra*), and, unlike the case of his widow, Mr. McClatchy's estate at times pertinent had been distributed to three testamentary trusts, and it is accordingly the beneficiaries of two of those trusts who claim federal income tax deduction for 1942, the year in which payment of the state assessment against Charles K. McClatchy was made (Appendix B, *infra*). The Tax Court opinion states that protest of the taxes against Mr. McClatchy was also made and that payment was withheld pending the determination in 1941 of the constitutionality of Section 34 of the California Personal Income Tax Act of 1935. (Appendix B, *infra.*) [16] In the

[16] There is nothing to show in the case of either decedent whether or not these protests were made in due conformity with the California law. See California Statutes, c. 329, Sec. 19, p. 1112.

interim, both his final federal income tax return and his estate tax return had been filed without any mention whatever of these items—the first being filed on March 15, 1937, and the second having been finally settled on May 14, 1940. (Appendix B, *infra.*) And likewise as in the case of his widow, no consents or waivers of any kind have ever been filed by the tax payors pursuant to Congress' requirement set forth in Section 134 (g) of the Revenue Act of 1942.

So, in respect to Charles K. McClatchy, we have approximately the same situation as pertains in the case of Ella K. McClatchy so far as the state taxes for the years 1935 and 1936 are concerned—saving, for whatever it may at this juncture be worth, the fact that as to the widow, the assessment for the 1936 levy was dated prior to her death in September of 1939. (Appendix B, *infra.*) [17] We have the same situation with respect to the claim of Mr. McClatchy's trust beneficiaries who paid the state tax levied against him for 1935 and 1936 as we do with respect to Mrs. McClatchy's estate who paid the state tax for these years on her behalf—the doctrine of the *Dixie Pine* case did not obviate the necessity for the filing of Section 134 (g) consents by the appropriate parties in either case. *Larkin's Estate* v. *Commissioner, supra.*

The Tax Court, although mentioning the filing dates of the federal estate tax return of both decedents and that nothing was mentioned therein about any of these items, makes no point of the matter. (Appendix B, *infra.*) However, counsel's brief asserts (Br. 12-13) that since, as he says, the state taxes in question had not accrued in respect of either decedent on account of the *Dixie Pine* principle, none of the taxpayers were en-

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[17] Of course, as earlier we have stated, Section 134 (g) of the Revenue Act of 1942, places an estate and a taker by inheritance in the same category. See *Ardenghi* v. *Helvering,* 100 F. 2d 406 (C. A. 2d), certiorari denied, 307 U. S. 622.

titled to any rights in respect of federal estate taxes. Let us examine this proposition. Code Section 812 (26 U.S.C. 1946 ed., Sec. 812), in defining the net estate of a decedent, states *inter alia* in subsection (b) that deduction from gross is allowable for taxes and for claims against the estate; Section 81.37 of Treasury Regulations 105 specifically declares not deductible from gross estate unpaid taxes upon income received after death.[18] And again, Section 81.29 of Treasury Regulations 105 provides in respect of deduction for administrative expenses and claims, etc., as follows:

> An item may be entered on the return for deduction though the exact amount thereof is not then known, provided it is ascertainable with reasonable certainty, and will be paid. No deduction may be taken upon the basis of a vague or uncertain estimate. In the event the amount of the liability was unascertainable at the time of final audit of the return by the Commissioner, and, as a consequence, deduction was not allowed therefor in such audit, and subsequently the amount of the liability is ascertained, relief may be sought as provided by * * * 81.96.

Section 81.96 of Treasury Regulations 105, referred to, *supra,* deals with claims for refund, and provides so far as here material that—

> Claims for the refund of estate tax imposed by the Internal Revenue Code must be filed within three years next after the payment of the amount sought to be refunded.

Section 11.19 of 1 Paul, Federal Estate and Gift Taxation, contains the following statement—

> To be allowable as a deduction it is not necessary that a claim be matured at the time of the decedent's

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[18] This section of the Regulations further states that no estate, succession, legacy, or inheritance tax is deductible.

> death. It may mature during the administration of the estate, or even after the estate is settled and the executors are discharged.

It will be recalled that the federal estate tax return of Charles K. McClatchy was filed July 24, 1937, and finally settled May 14, 1940 (Appendix B, *infra*); that of Ella K. McClatchy was filed December 20, 1940, and finally settled June 11, 1942. The pertinent California taxing law was passed in 1935; it was of course *prima facie* valid, and—assuming that the final settlement date of the husband's federal estate tax liability would govern—even the amount of the respective decedents' liability for the 1935 and 1936 state income tax, provided the state law were to be adjudged constitutional, was ascertainable, all in ample time for their representatives to have called this matter to the attention of the Commissioner during the dealings in respect of the settlement of the taxes on the decedents' estates.[19] But apparently the decedents' representatives "slept on their rights"; and in line with our previous suggestion that the amounts of the purported liabilities could have been paid into the state court under the section of the California Probate Code we have quoted,[20] we put forward now the thought that the decedents' representatives, understanding as they must have done the distinct possibility that the California law imposing the tax would be sustained, should have traversed each and every likely avenue looking toward tax reduction. Of course, we are not suggesting that there was any right here to "double" deduction.

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[19] Manifestly, what we say here applies *a fortiori* to the state income taxes levied against Mrs. McClatchy covering the years 1938 and 1939.

[20] That suggestion was made in our discussion of the final income tax return of Ella K. McClatchy, but it could apply as well at this point, we submit, with respect to course of administration proceedings *re* both Charles and Ella McClatchy.

The argument we now are making is one only in the alternative.

And at the very least—if we consider these state taxes so "immature" that they could not have been claimed in the original returns or considered in conference with a view to postponement of final settlement of estate tax until the *McCreery* litigation came to an end—then we maintain that certainly as to Ella K. McClatchy, who died in September of 1939, the estate had more than sufficient time to file a claim for refund as the Regulations quoted, *supra,* in part provide; the *McCreery* decision came down in March of 1941, and whatever uncertainty or "immaturity" there may *arguendo* have been theretofore as respects the matter at hand, was once and for all then at an end.[21]

B. *No part of the interest on the state income taxes assessed in respect of either decedent was deductible by any of the taxpayers herein, except the amounts which the Commissioner allowed the Ella K. McClatchy Estate as representing that part of the interest on the state tax deficiencies accruing after her death*

As will be evident to this Court, most of what we have said in the foregoing subheading "A" of this argument applies here with equal force. Again, liability for interest must be that of the taxpayer. See Section 23 (b) of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 23); *Central Bank of Cleveland* v. *Commissioner,* 35 B.T.A. 489; 4 Mertens, Law of Federal

[21] Perhaps this is as good a place as any in our discussion to mention counsel's plea (Br. 14-15) that this is a hardship case and therefore relief should be granted under Code Section 3801 (26 U.S.C. 1946 ed., Sec. 3801). That section is a rather complicated adjustment law directed primarily at the rigors of the statute of limitations. Counsel points to no provision thereof which is or might be applicable to any of the facets of the instant case, and we can ourselves discover none.

Income Taxation, Sec. 26.03. Like the state taxes themselves, the amounts of interest claimed as deductible by these taxpayers and disallowed were not obligations imposed upon *them;* certainly the trust beneficiaries paid strictly as volunteers.[22] As for the executrices of the Ella K. McClatchy Estate, they are fiduciaries and have a liability as such, but that liability obviously is not the kind with respect to deduction encompassed in the rule of, for example, *Perry* v. *Commissioner, supra;* 4 Mertens, Law of Federal Income Taxation, Sec. 26.03, *supra.* Perhaps we can liken the executrices here to transferees (although admittedly they do not fall within the definition of a transferee as found in Section 311 (a) (1) (f) of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 311)), for if they were to pay out estate monies to the detriment of the Government they would undoubtedly be personally liable under Section 3467 of the Revised Statutes (31 U.S.C. 1946 ed., Sec. 192) and be subject under Section 311 (a) (2) of the Code to the same provisions as are transferees.

The Tax Court and the Court of Appeals for the Third Circuit once held that transferees may deduct interest accrued subsequent to date of transfer of assets upon taxes of the transferor paid by the transferee but may not deduct interest paid prior to the transfer. The Third Circuit cases are both affirmances of the Tax Court; they are *Commissioner* v. *Breyer* and *Commissioner* v. *Koppers Co.,* reported as one at 151 F. 2d 267. The subject matter of the *Koppers* case was interest on income taxes of the transferor; the *Breyer* case involved interest on estate taxes of the estate. Three Courts of Appeals, reversing decisions of the Tax Court, have held that a transferee may not deduct

[22] Interest accrued on the state tax deficiencies here in question were disallowed as deductions accordingly except as stated in the heading hereof. See Appendix B, *infra.*

interest accrued either prior to or subsequent to the transfer upon debts of the transferor paid by the transferee. *Commissioner* v. *Henderson's Estate,* 147 F. 2d 619 (C.A. 5th); *Nunan* v. *Green,* 146 F. 2d 352 (C.A. 8th); *Commissioner* v. *Green,* 148 F. 2d 157 (C.A. 9th). Accordingly, if we liken Mrs. McClatchy's estate to a transferee, it has had better than the treatment allowed by the three Courts of Appeals last referred to, for as heretofore noted, only the interest accrued to date of her death has been disallowed. See Appendix B, *infra.*[23]

II

The Tax Court Correctly Confirmed the Commissioner's Determination That No Deduction Was Allowable from Income of Ella K. McClatchy's Estate for Interest Upon a Deficiency Assessed in Respect of State Inheritance Taxes

At the risk of seemingly endless repetition, we assert again that the interest now in question was not deductible by the estate because the taxes to which the interest was incident were not obligations of the estate. The inheritance tax law of California does not place the basic liability for payment of the tax upon the estate, as does the federal estate tax law (*Y.M.C.A. v. Davis,* 264 U. S. 47); it places it upon the distributees. The California law is a succession tax, as distinguished from a death duty, being based upon the right to *acquire* rather than on the privilege in the decedent to determine to whom the property shall pass. The California rates depend upon the degree of relationship, if any, between decedent and distributee—the rate being less for amounts distributed to those bearing close family relationship to the decedent than to more distant relatives or others. See *Estate of Kennedy,* 157

[23] The cases of *Commissioner* v. *Green, supra,* and *Nunan* v. *Green, supra,* both reiterate the principle that the interest obligation must be that of the taxpayer. 4 Mertens, Sec. 26.03, *supra.* One taxable entity cannot take deduction for the liability of another.

Cal. 517, 108 Pac. 280; *In re Belville's Estate,* 152 P. 2d 229; *Cohn* v. *Cohn,* 20 Cal. 2d 65, 123 P. 2d 833. Cf. *Knowlton* v. *Moore,* 178 U. S. 41; *Hill* v. *Commissioner,* 37 B.T.A. 782.

We quote from the *Cohn* case, *supra,* as follows (123 Pac. 2d 833, 834-835):

> Generally speaking, the state [California] assesses the privilege of succeeding to property, and computes the tax upon the interests of the legatees or devisees and the degree of relationship, if any, to the decedent. * * * The tax is not one of the expenses of administration or a charge upon the general estate of the decedent; it is collectible out of each specific share or interest to which the beneficiary succeeds and not from the general property of the estate * * * Under the Inheritance Tax Act of 1921 * * *,[24] which was in effect at the date of Charles Cohn's death, the inheritance tax constitutes a lien upon the property passed or transferred, and executors and administrators are liable for it. By section 9 of the Act, any executor or administrator having in charge any legacy or property for distribution, is directed to deduct the tax therefrom, or, if the property be not money, he is directed to collect the tax thereon from the legatee. * * * However, the fact that the executor or administrator must pay the tax and is authorized to deduct the amount assessed against the distributive share of each person inheriting or succeeding to the estate does not change the nature of the tax as one upon the right to inherit. The provisions concerning collection of the tax are administrative in character; they do not fix the liability for it upon the estate. * * *

At first blush, all of this discussion anent the character of the California tax now being considered is

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[24] Which is in material substance the equivalent of the statute under which the inheritance taxes here in question were assessed. See Act 8495 of the General Laws of California (1939).

gratuitous, for Code Section 23 (c) expressly prohibits deduction from income of either estate or inheritance taxes. However, neither statute nor Regulations covers the matter of deduction of *interest* on such taxes, which is the problem confronting us. It would therefore appear that we must needs resort to our fundamental question: Whether this interest was or was not a debt of the claimant estate;[25] and in that light, our foregoing argument is pertinent we think, for the above-cited authorities make it clear beyond peradventure that since this interest was allied with a particular debt, i.e., the California inheritance taxes, its payment was due not from Mrs. McClatchy's estate but from the distributees under her will.[26]

Our point, in fine, is that the interest here disallowed, being an incident of the debt (the state inheritance tax) follows the principal obligation accordingly. It therefore cannot on any score be a proper deduction from current income of the estate as is claimed. In *Jones* v. *Hassett,* 45 F. Supp. 195 (Mass.) it was held that Code Section 23 (b) and its antecedent equivalents permit a deduction for interest on indebtedness only when the interest arises from a debt owed by the tax-

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[25] It will be recalled that the inheritance taxes in re Mrs. McClatchy, together with interest, were actually paid by McClatchy Newspapers and charged against the three testamentary trusts created by Charles K. McClatchy. The trusts claimed a deduction of the interest in their 1943 returns, which was disallowed by the Commissioner. In 1944, Mrs. McClatchy's estate contended that payment was improperly made by the Charles K. McClatchy trusts, whereupon the newspapers corrected these charges on their books and showed them made against Mrs. McClatchy's estate. This change of front appears to have satisfied the Commissioner sufficiently so that he regarded the estate as the payor, though it does not seem to have satisfied the Tax Court that the estate did pay this interest in 1943, the year of its claim. See Appendix B, *infra.*

[26] There is nothing in the record to indicate whether, or to what extent, distribution of Mrs. McClatchy's estate had been effected at the time payment of the interest on these inheritance taxes was made.

payer claiming the right of deduction. See also *Sulzberger* v. *Commissioner,* 33 B.T.A. 1093; *Holden* v. *Commissioner,* 27 B.T.A. 530. The liability of an executor or administrator for interest on the type of inheritance taxes here involved due in respect of their decedent is merely, we repeat, an administrative obligation, just as is the principal of the obligation itself.

CONCLUSION

The decisions of the Tax Court should be affirmed as to all of the taxpayers and on all of the issues.

Respectfully submitted,

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DECEMBER 1949.

APPENDIX A

Internal Revenue Code:

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer there shall be allowed as deductions and credits for the taxable period in which falls the date of his death, amounts accrued up to the date of his death (except deductions under section 23 (o), if not otherwise properly allowable in respect of such period or a prior period.

(26 U.S.C. 1946 ed., Sec. 43.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 134. INCOME IN RESPECT OF DECEDENTS.

* * * * *

(b) *Deductions and Credits.*—The last sentence of section 43 (relating to deductions and credits accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death."

* * * * *

(d) *Deductions of Estate.*—Section 23 (relating to deductions) is amended by inserting at the end thereof the following:

"(w) *Deductions of Estate, Etc., on Account of Decedent's Deductions.*—

"(1) In the case of a person described in section 126 (b), the amount of the deductions in respect of a decedent to the extent allowed by such subsection.

"(2) In the case of a person described in section 126 (a), the amount of the deductions in respect of a decedent to the extent allowed by section 126 (c)."

(e) The Internal Revenue Code is amended by inserting after section 125 the following new section:

"SEC. 126. INCOME IN RESPECT OF DECEDENTS.

* * * * *

"(b) *Allowance of Deductions and Credit.*—The amount of any deduction specified in section 23 (a), (b), (c), or (m) (relating to deductions for expenses, interest, taxes, and depletion) or credit specified in section 31 (foreign tax credits), in respect of a decedent which is not properly allowable to the decedent in respect of a taxable period in which falls the date of his death, or a prior period, shall be allowed:

"(1) *Expenses, interest, and taxes.*—In the case of a deduction specified in section 23 (a), (b), or (c) and a credit specified in section 31, in the taxable year when paid,—

"(A) to the estate of the decedent; except that

"(B) If the estate of the decedent is not liable to discharge the obligation to which the deduction or credit relates, to the person who, by reason of the death of the decedent or by bequest, devise, or inheritance acquires, subject to such obligation, from the decedent an interest in property of the decedent."

* * * * *

(f) *Effective Date of Amendments.*—The amendments made by subsections (a) and (b) of this section shall be applicable with respect to taxable years beginning after December 31, 1942, and the amendments made by subsections (c), (d), and (e) of this section shall be applicable with respect to taxable years ending after December 31, 1942.

(g) *Taxable Years Before 1943.*—In case the taxable period in which falls the date of the death of the decedent began after December 31, 1933, and before January 1, 1943, the tax for such taxable period shall be computed as if provisions corresponding to the provisions of sections 42 (a) and 43 of the Internal Revenue Code, as amended by subsections (a) and (b) of this section, were a part of the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1938, or the Internal Revenue Code, whichever is applicable to such taxable period. In the case of the estate of such a decedent and of each person who acquires by reason of the death of such decedent or by bequest, devise, or inheritance from such decedent the right to receive the amount of items of gross income of the decedent which upon the application of the preceding sentence are not properly includible in respect of the taxable period in which falls the date of the decedent's death or a prior period, the tax for each taxable period ending on or after the date on which the decedent died shall be computed by including in gross income the amounts with respect to such decedent which would be includible, and by allowing as deductions and credits the amounts with respect to such decedent which would be allowable, if provisions corresponding to the provisions of the section inserted in the Internal Revenue Code by subsection (e) of this section were a part of the law applicable to such taxable period. The provisions of this subsection shall not be applicable unless there are filed with the Commissioner (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, and at the time prescribed by such regulations) signed

consents made under oath by the fiduciary representing the estate and by each such person (or if any such person is no longer in existence or is under disability, by his legal representative) that with respect to such amounts, the tax of the estate, or the tax of such person, as the case may be, shall be computed under the provisions of this subsection for each taxable period ending on or after the date of the death of the decedent and the tax of the decedent shall be computed under such provisions for the taxable period of the decedent in which falls the date of his death. * * *

(26 U.S.C. 1946 ed., Secs. 22, 23, 42, 43, 126.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.126-4. *Income in Respect of Decedent Dying in Taxable Year Beginning Before 1943; Tax of Decedent.*—

* * * * *

(b) *Consents; tax of estate and persons filing consents.*—For the purposes of the election provided by section 134(g) of the Revenue Act of 1942, the consents must be filed by the fiduciary of the estate and by each person who received any right to income in respect of the decedent by bequest, devise, or inheritance from the decedent or by reason of the death of the decedent. Ordinarily, the persons who must file such consents are the administrator or the executor of the estate, the residuary beneficiary of the estate, the trustees and beneficiaries of any trust the corpus of which includes such right to income, every other specific beneficiary of such right, and every person who receives any such right to survivorship, such as the surviving joint tenants of any right to income held in joint tenancy and the surviving coowners or beneficiaries of any defense bonds owned by the decedent on which there is accrued interest not includible in his gross income under his method of ac-

counting. If any such person is not in existence or is under legal disability, the consent may be made by his legal representative.

All of such consents with respect to any one decedent shall be filed at the same time with the Commissioner of Internal Revenue, Washington, D. C. The consents must be filed not later than one year after the time prescribed for filing the return for the last taxable year of the decedent (not including any extension of time for such filing) or January 1, 1944, whichever is later.

The executor, administrator, or other fiduciary of the estate (or if there is no such fiduciary, the principal beneficiary of the estate) must submit, under oath, a statement accompanying the consents and containing the following information:

* * * * *

(3) A list of all the items, allowed as deductions and credits in computing the net income of the decedent for his last taxable year, which would not be allowable as deductions and credits if the amendments made by section 134 (b) of the Revenue Act of 1942 were applicable to the revenue law in effect for such taxable year. See section 29.43-1.

(4) The amount allowable as a deduction or credit with respect to each such item listed in (3), the aggregate of such amounts, the amount of the deductions for estate tax purposes from the gross estate of the decedent in respect of claims which are founded upon that portion of such items as are described in section 126 (b), and the aggregate of such deductions.

* * * * *

(6) The names and addresses of every person entitled by bequest, devise, or inheritance from the decedent or by reason of the death of the decedent to receive any property subject to an obligation of the decedent for which a deduction or credit described in section 29.126-2 is allowable.

Each consent shall be made under oath and shall contain the following:

(A) The name and address of the person filing the consent, and the collection district in which he files his return.

(B) The name and address of the decedent, the date of his death, the period covered by his last income tax return, and the collection district in which such return was filed.

* * * * *

(D) A list of all the items in respect of the decedent for which such person may claim deductions and credits described in section 29.126-2, showing the face value of such items, the property received by bequest, devise, or inheritance from the decedent or by reason of the death of the decedent subject to the obligation for which any such deduction is allowed, and, if any such obligation has been paid, the amount and date paid.

(E) A recomputation of the net income and of the tax of the person filing the consent, made (i) for each taxable year in which any item described in (C) was collected, or in which the right to any such item was transferred to a person not entitled to such right by bequest, devise, or inheritance from the decedent or by reason of the death of the decedent, (ii) for each taxable year in which any item listed in (D) was paid, or would otherwise be allowed as a deduction or credit under section 29.126-2, and (iii) for each taxable year in which there is a carry-over or carry-back of any item from any taxable year described in clauses (i) and (ii). Such recomputation shall be made under the provisions of sections 29.126-1, 29.126-2, and 29.126-3 by including in gross income the income in respect be allowed as a deduction or credit under section 126 (a) and by allowing as deductions and credits the deductions and credits which are allowable under section 126 (b) and (c) when section 126 is made applicable to such taxable year and when the

amendments made by section 134 (a) and (b) of the Revenue Act of 1942 are made applicable to the law in effect for the last taxable year of the decedent (see sections 29.42-1 and 29.43-1). This recomputation shall be made only for taxable years the returns for which were due prior to the date and consent is filed. The increase or decrease in tax for each such taxable year as a result of such recomputation shall be shown, as well as the aggregate of such increases and the aggregate of such decreases.

(F) An unqualified statement by the person filing the consent agreeing that his tax for each taxable year ending on or after the date the decedent died and the tax of the decedent for his last taxable year shall be computed under the provisions of section 134 (g) of the Revenue Act of 1942.

* * * * *

APPENDIX B

THE TAX COURT OF THE UNITED STATES

ESTATE OF ELLA K. McCLATCHY, ELEANOR McCLATCHY AND CHARLOTTE MALONEY, EXECUTRICES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

CHARLOTTE MALONEY, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ELEANOR McCLATCHY, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 13214, 13215, 13216. Promulgated March 18, 1949.

In 1942 testamentary trusts and/or the estate of decedents paid state income taxes assessed against decedents covering periods before their deaths,

together with interest thereon. These taxes were not paid before 1942 because of a contention that the state law imposing the taxes was unconstitutional. No consents were filed as required by section 134 (g) of the Revenue Act of 1942. Deductions were claimed for the year 1942 on account of such payments in that year. *Held,* such deductions were not available under the provisions of section 134, Revenue Act of 1942; *held, further,* interest on inheritance taxes paid to the State of California by the estate of a decedent was not interest on an obligation of the estate, and the estate may not deduct such payment from gross income under section 23 (b), Internal Revenue Code.

John J. Hamlyn, Esq., for the petitioner.
A. J. Hurley, Esq., for the respondent.

KERN, Judge: In these proceedings, consolidated for hearing and opinion, the Commissioner determined deficiencies as follows:

Petitioner	Docket No.	1942 income tax	Income and victory tax for 1943
Estate of Ella K. McClatchy	13214	$8,639.98	$1,731.25
Charlotte Maloney	13215	.....	213.54
Eleanor McClatchy	13216	.....	2,904.43

The deficiencies determined against petitioners Charlotte Maloney and Eleanor McClatchy involve the year 1942 by virtue of the provisions of the Current Tax Payment Act of 1943. The estate of Ella K. McClatchy claims overpayment of the 1943 income and victory tax in the amount of $1,912.12.

The first issue, raised on behalf of all petitioners, is whether deductions may be taken in the year 1942 for payment of income taxes to the State of California assessed against Charles K. and Ella K. McClatchy, both deceased.

The second issue, raised on behalf of the estate of Ella K. McClatchy, is whether the estate may deduct from gross income interest on an inheritance tax deficiency assessed by the State of California.

An issue involving receipt of dividends by petitioners has been abandoned.

It is stipulated that in the determination of deficiency respondent did not give the estate of Ella K. McClatchy credit for the payment in February 1947 of additional income taxes, computed on items not here in issue, in the amount of $1,669.93 for the year 1942, and additional income and victory taxes in the amount of $1,064.50 for the year 1943, together with interest in the respective amounts of $362.05 and $166.92. Similarly, the respondent in his answer admits that petitioner Eleanor McClatchy received in January 1947 "a demand from the collector at San Francisco for 1943 tax due and payable in the amount of $2,546.52. This demand (plus interest of $399.31) was paid in February 1947." Respondent makes no reference to these matters in his brief. We understand that the issues raised by petitioners in connection therewith are conceded by respondent.

The facts were stipulated and the proceedings were submitted for decision under Rule 30. We find the facts to be as stipulated. We refer only to such facts as are necessary for our determination.

Petitioners Eleanor McClatchy and Charlotte Maloney are the beneficiaries of testamentary trusts Nos. 1 and 2, respectively, of three testamentary trusts created by Charles K. McClatchy, who died April 27, 1936. Each trust received one-third of his estate. These petitioners are also the executrices of the estate of Ella K. McClatchy, who died September 23, 1939. They represent the estate, which is the third petitioner herein. The returns in question were filed with the collector for the first district of California, at San Francisco.

The Franchise Tax Commissioner of the State of California, acting pursuant to section 34 of the California Personal Income Tax Act of 1935, assessed additional state income taxes against Charles K. McClatchy and Ella K. McClatchy after their deaths, as follows:

Taxable period ended Dec. 31—	Date of Assessment	Additional assessment	
		Charles K. McClatchy	Ella K. McClatchy
1935	Jan. 23, 1939	$1,791.64	$1,797.05
1936	Apr. 1, 1940	2,170.44	5,317.17
Total		3,962.08	7,114.22

Payment of these taxes was protested and withheld pending the determination of the constitutionality of section 34 of the California Personal Income Tax Act of 1935.

On March 7, 1941, the Supreme Court of California determined that section 34 was constitutional. Payment on behalf of the two decedents was made on May 5, 1942, as follows:

Decedent	Deficiency	Interest	Paid by—	Amount
Charles K. McClatchy...	$3,932.08	$1,309.33	Trust #1.....	$1,747.14
			Trust #2.....	1,747.14
			Trust #3.....	1,747.14
			Total.....	5,241.42
Ella K. McClatchy.....	7,110.22	2,264.59	Estate.....	9,374.81

No claim for the deduction of the taxes assessed against Charles K. McClatchy and paid by the three testamentary trusts was made in that decedent's final Federal income tax returns, filed March 15, 1937, or in that decedent's Federal estate tax return, which was filed July 24, 1937, and finally settled May 14, 1940. Deductions on account of the payment of these taxes plus interest were taken in 1942 by the parties paying them in that year.

The Commissioner increased the income distributable to petitioners Eleanor McClatchy and Charlotte Maloney from the Charles K. McClatchy trusts Nos. 1 and 2, respectively, in the amount of $1,747.14, each for the year 1942.

No consents or waivers were filed pursuant to section 134 of the 1942 Revenue Act, or section 126 of the Internal Revenue Code, and the appropriate regulations.

The Commissioner allowed the estate of Ella K. McClatchy a deduction for 1942 Federal income tax purposes of $1,113.92 representing interest on the state income tax deficiency accrued after the death of Ella K. McClatchy. The deduction of the $7,110.22 state income tax and $1,150.67 of the total interest thereon was disallowed.

Section 34 of the California Personal Income Tax Act of 1935 was repealed in 1937.

In December 1942 the state tax commissioner assessed additional deficiencies in income tax against Ella K. McClatchy as follows:

Taxable Year	Tax	Interest	Total
1938	$271.42	$63.85	$335.27
1939	543.40	101.03	644.43
Total	814.82	164.88	979.70

These amounts were paid by the estate and claimed as a deduction in 1943. The Commissioner disallowed the deduction of the state income tax in the total amount of $814.82 and $7.22 of the interest that had accrued before the death of Ella K. McClatchy.

Ella K. McClatchy's final Federal income tax return covering the year 1939 up to the time of her death was filed March 15, 1940. On October 9, 1945, the estate filed a claim for refund of income tax allegedly overpaid in the amount of $5,788.28 for the year 1939. The refund was denied January 6, 1947. Her Federal estate tax return was filed December 20, 1940, and a closing agreement was effected June 11, 1942. The deductions in question were not taken in either the final income tax return or the estate tax return. No waivers or consents were filed pursuant to section 134 of the Revenue Act of 1942 or section 126 of the Internal Revenue Code and the applicable regulations.

In December 1943 additional California inheritance tax of $5,304.41, plus interest of $2,223.41, was assessed and paid in 1943 in connection with the estate of Ella K. McClatchy. The beneficiaries of the Charles K. McClatchy trusts were also the beneficiaries of three trusts created by the last will of Ella K. McClatchy. The tax and interest were paid by the McClatchy newspapers and charged against the three testamentary trusts of Charles K. McClatchy. The three trusts claimed a deduction of the interest in their returns for 1943 which was disallowed by the Commissioner.

On June 1, 1944, the petitioner estate contended that the payments were improperly made by the trusts, and accordingly the McClatchy newspapers corrected these charges on their books and showed them made against petitioner estate. The estate now claims the deduction

for 1943 of the interest on the inheritance taxes. No other claim for the interest deduction has been allowed.

The returns in question were filed on the cash receipts and disbursements basis.

Both parties are in apparent agreement that the deductions claimed for the year 1942 on account of the payments of state income taxes assessed against the decedents, Charles K. and Ella K. McClatchy, together with interest accrued prior to their deaths, must be supported by the provisions of sections 23 (w) and 126, added to the Internal Revenue Code by section 134 of the Revenue Act of 1942,[27] since both taxes and interest

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[27] SEC. 134. INCOME IN RESPECT OF DECEDENTS.

(a) GENERAL RULE.—The last sentence of section 42 (a) (relating to inclusion in gross income of amounts accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accural method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of the taxpayer's death."

(b) DEDUCTIONS AND CREDITS.—The last sentence of section 43 (relating to deductions and credits accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death."

(c) CROSS REFERENCE.—Section 22 (relating to definition of gross income) is amended by inserting at the end thereof the following:

"(1) INCOME OF DECEDENTS.—For inclusion in gross income of certain amounts which constituted gross income in respect of a decedent, see section 126."

(d) DEDUCTIONS OF ESTATE.—Section 23 (relating to deductions) is amended by inserting at the end thereof the following:

"(w) DEDUCTIONS OF ESTATE, ETC., ON ACCOUNT OF DECEDENT'S DEDUCTIONS.—

"(1) In the case of a person described in section 126 (b), the

were assessed against the decedents and not against the entities which made the payments on account thereof. See *Herbert G. Perry et al., Executors,* 32 B.T.A. 513; *Estate of Jacob S. Hoffman,* 36 B.T.A. 972; *Helvering* v. *Enright,* 312 U. S. 636; *Micajah Pratt Clough, Jr.,* 45 B.T.A. 97; *Courtnay Burton,* 37 B.T.A. 636.

Respondent contends that, by reason of the plain and unambiguous language of section 134 (g), none of the statutory provisions relied on by petitioners are applicable to tax years beginning prior to December

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amount of the deductions in respect of a decedent to the extent allowed by such subsection.

"(2) In the case of a person described in section 126 (a), the amount of the deductions in respect of a decedent to the extent allowed by section 126 (c)."

(e) The Internal Revenue Code is amended by inserting after section 125 the following new section:

"SEC. 126. INCOME IN RESPECT OF DECEDENTS.

* * * * * * *

"(b) ALLOWANCE OF DEDUCTIONS AND CREDIT.—The amount of any deduction specified in section 23 (a), (b), (c), or (n) (relating to deductions for expenses, interest, taxes, and depletion) or credit specified in section 31 (foreign tax credit), in respect of a decedent which is not properly allowable to the decedent in respect of the taxable period in which falls the date of his death, or a prior period, shall be allowed:

"(1) EXPENSES, INTEREST AND TAXES.—In the case of a deduction specified in section 23 (a), (b), or (c) and a credit specified in section 31, in the taxable year when paid,—

"(A) to the estate of the decedent; except that

"(B) if the estate of the decedent is not liable to discharge the obligation to which the deduction or credit relates, to the person who, by reason of the death of the decedent or by bequest, devise, or inheritance acquires, subject to such obligation, from the decedent an interest in property of the decedent."

* * * * * * *

(f) EFFECTIVE DATE OF AMENDMENTS.—The amendments made by subsections (a) and (b) of this section shall be applicable with respect to taxable years beginning after December 31, 1942, and the amendments made by subsections (c), (d), and (e) of this section shall be applicable with respect to taxable years ending after December 31, 1942.

(g) TAXABLE YEARS BEFORE 1943.—In case the taxable period in which falls the date of the death of the decedent began after

31, 1942, because no consents required as a prerequiste to such a retroactive application were filed by any of the entities involved in this proceeding. We agree with this contention.

Petitioners argue that the claimed deductions could not have been taken in the final income tax returns of the several decedents, since at that time there was no basis for an accrual of the items in question under the rule later stated by the Supreme Court in *Dixie Pine Products Co.* v. *Commissioner,* 320 U. S. 516; that, therefore, there was no election as to their deduction; that, consequently, no such consents as those mentioned in section 134 (g) were necessary; and that, therefore, none should be required.

December 31, 1933, and before January 1, 1943, the tax for such taxable period shall be computed as if provisions corresponding to the provisions of section 42 (a) and 43 of the Internal Revenue Code, as amended by subsections (a) and (b) of this section, were a part of the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1938, or the Internal Revenue Code, whichever is applicable to such taxable period. In the case of the estate of such a decedent and of each person who acquires by reason of the death of such decedent or by bequest, devise, or inheritance from such decedent the right to receive the amount of items of gross income of the decedent which upon the application of the preceding sentence are not properly includible in respect of the taxable period in which falls the date of the decedent's death or a prior period, the tax for each taxable period ending on or after the date on which the decedent died shall be computed by including in gross income the amounts with respect to such decedent which would be includible, and by allowing as deductions and credits the amounts with respect to such decedent which would be allowable, if provisions corresponding to the provisions of the section inserted in the Internal Revenue Code by subsection (e) of this section were a part of the law applicable to such taxable period. The provisions of this subsection shall not be applicable unless there are filed with the Commissioner (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, and at the time prescribed by such regulations) signed consents made under oath by the fiduciary representing the estate and by each such person (or if any such person is no longer in existence or is under disability, by his legal representative) that with respect to such amounts the tax of the estate, or the tax of such person, as the case may be, shall be computed under the provisions of this subsection for each taxable period ending on or after the date of the [death of the] decedent and the tax of the decedent shall be computed under such provisions for the taxable period of the decedent in which falls the date of his death. * * *

The short answer to this contention is that consents *are* required by the clear and unambiguous language of the statute. As the Supreme Court said in *Deputy* v. *DuPont,* 308 U. S. 488: "* * * we can not sacrifice the 'plain, obvious and rational meaning' of the statute even for 'the exigency of a hard case'." See also *Taft* v. *Commissioner,* 304 U. S. 351. Nothing in the legislative history or purpose of the statute in question casts doubt upon its meaning. Even if we were permitted to enlarge its meaning by construction (an untenable postulate, see *Journal Publishing Co.,* 3 T.C. 518, 522), we are of the opinion that the general character of the statute requires a narrow, rather than a broad, construction. See *Estate of Frances T. Ingraham,* 8 T.C. 701; *Larkin* v. *Commissioner,* 167 Fed. (2d) 115.

The next issue concerns the deductibility by an estate of interest accrued and paid upon deficiencies in state inheritance taxes. These taxes are not obligations of the estate. See secs. 2, 3, and 9, Act 8495 of the General Laws of California; *In re Belville's Estate,* (Cal. App. 1944), 152 Pac. (2d) 229; *Cohn* v. *Cohn,* 20 Cal. (2d) 65; 123 Pac. (2d) 833; *Estate of Kennedy,* 157 Cal. 517, 108 Pac. 280. See also *Louise G. Hill,* 37 B.T.A. 782. Therefore, the payment of interest by the estate on the inheritance tax deficiencies does not give rise to a deduction by the estate, even though we assume that the interest was paid by the estate in 1943, a matter concerning which we have considerable doubt.

Decision will be entered under Rule 50.

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